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In The

Supreme Court of the United States

MARYBETH DAVIS,

Petitioner,

v.

THE STATE OF WEST VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a prosecution fourteen years after the alleged crime, in which a mother is accused of poisoning her daughter with caffeine and the State's theory of the homicide is based on the "guess" that the official state toxicology and pathology reports are wrong, is it a violation of the petitioner's Due Process Rights as set out in *Brady* and its progeny:

A. For the State experts to first "guess," without proof, that the official toxicology report is in error and, under the pretext of fixing the error, to secretly increase the amounts of caffeine ten times so that the amount of caffeine is increased from the harmless equivalent of less caffeine than contained in two cups of coffee to a lethal caffeine equivalent of fifty to one hundred cups of coffee; and,

B. For the State to withhold the original spectrographs which prove the original toxicology findings are, in fact, accurate and a caffeine poisoning is impossible; and

C. For the State to withhold tissue slides which show conclusively that the victim died of Reye's Syndrome.

2. Is it a violation of the Petitioner's Due Process Rights and Rights of Confrontation, for the Justices of the West Virginia Supreme Court to *sua sponte* read and interpret for themselves, scientific data in the form of spectrographs and tissue slides, so that the expert testimony interpreting the evidence is ignored and their scientific meaning is lost?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	17
CONCLUSION	28
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ..... *passim*

Banks v. Dretke, 124 S. Ct. 1256 (2004) 17, 19

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) 16, 21, 25, 27, 29

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995) 19

State v. Davis, 205 W. Va. 569, 519 S.E.2d 852 (1999) 2, 4

Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936 (1999) 19

BRITISH AUTHORITY:

Royal Courts of Justice, Strand, London, WC2A2LL, January 19, 2004, Angela Cannings, Appellant, v. Regina 27

In the Matter of B (A child) And the Matter of the Children Act 1989 between Kent County Council and (1) the mother and (2) the father 27

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const., Amend. VI 1

U.S. Const., Amend. XIV 1

MISCELLANEOUS

D. Marlow, "From Black Robes to White Lab Coats; The Ethical Implications Of A Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process." St. John's L. Rev., Spring 1998 25

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the West Virginia Supreme Court that is appealed is reported as *State of West Virginia v. Marybeth Davis*, ___ W. Va. ___, ___ S.E.2d ___, 2004 WL 2743514 (2004).

JURISDICTION

The Court's opinion under appeal was entered December 4, 2004. A timely Petition for Reconsideration of the Appeal was filed on January 5, 2005 and was denied on February 16, 2005. Both opinions are attached as Appendices A and B.

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right – to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;" U.S. Constitution, Amend. VI.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amend. XIV.

STATEMENT OF THE CASE

Introduction:

Petitioner respectively petitions for a Writ of Certiorari to review a decision of the West Virginia Supreme Court of Appeals which denied the Petitioner's Rule 33 Motions for a new trial based on newly discovered evidence. The petitioner, Marybeth Davis, was convicted on September 15, 1997, in the Circuit Court of Greenbrier County, West Virginia, for the 1981 attempt to injure her six week old son, Seth, by insulin and the 1982 murder, by caffeine poisoning, of her three year old daughter, Tegan.

She was sentenced to life in the penitentiary without any possibility of parole on the murder charge and received an additional five to fifteen years on the attempt to injure her son. The first appeal of her conviction, based on the insufficiency of the evidence and prosecutorial misconduct was denied in 1999. *State v. Davis*, 205 W. Va. 569, 519 S.E.2d 852 (1999).

Following the denial of the appeal of her conviction, the defendant located toxicology spectrographs and other medical documents in the West Virginia Medical Examiner's Office; volumes of notes and tissue slides in the possession of the key state witness; and was able to conduct newly developed genetic tests, not available before the trial. The Petitioner filed numerous Rule 33 Motions which were consolidated into one motion. The West Virginia Supreme Court, using an "abuse of discretion standard" of review, affirmed the lower Court's denial of the motions for a new trial. Petitioner contends that with this *Brady* evidence the petitioner can now prove to a scientific certainty her innocence.

In 1982, the facts surrounding the death of Tegan Davis and the alleged injury by insulin injection of Seth Davis were fully investigated by State officials. No prosecution occurred. The State officials disregarded the accusation that Seth was injected with insulin. No one saw anyone inject any insulin, or found any injection sites. The test to determine whether Seth had been injected with artificial insulin was considered to be too unreliable. The State officials accepted the diagnosis of the geneticists that Seth had Leigh's Syndrome, a fatal genetic disease.

The accusation that Tegan died of caffeine poisoning was made by Dr. Hooper, who, on autopsy found white beads in Tegan's digestive tract, which she theorized were the remains of caffeine pills. The official toxicology report found that the total amount of caffeine found in Tegan's body was less than had she drunk two cups of coffee or a coca cola. The official pathology report of the tissues confirmed the diagnosis of the treating physician that

Tegan died of Reyes Syndrome. Dr. Hooper was considered to be a bad pathologist for basing theory of a homicide on the belief that the official toxicology report was in error. Marybeth was regarded as a grieving mother who had suffered the catastrophic loss of two of her children. The case lay dormant for fourteen years. After separating from her husband in 1987, Marybeth raised her son, Gary, and her adopted daughter, Katie, as a single mother without incident until her indictment.

In 1995, the State resurrected the case. The State claimed that the original investigation had been lost with the passage of time, but with the aid of Dr. Hooper, the State was able to locate most of the critical documents. The prosecution claimed the case was resurrected because with the passage of time, the State had come to understand and appreciate a controversial mental disorder called Munchausen Syndrome By Proxy. Those who have this alleged disorder harm their children, in order to gain sympathy for themselves.

In 1996, following Marybeth's indictment, the defense filed motions to redo the toxicology tests and to obtain the tissue slides. Appendix H. The State responded that the tissue slides no longer existed. Appendix I. The State claimed that they were going to bring in Dr. Backer who had done the original toxicology tests in 1982 to defend his findings. The State agreed to an order barring Dr. Hooper from speculating on the chemical content of the white beads found by Dr. Hooper in Tegan's stomach. The State said it had provided the defense all of the *Brady* material that still survived. No mention was made that Dr. Hooper based her theory of a homicide on the belief that the toxicology findings were in error.

In 1997, in a much publicized trial, the State described this as a circumstantial case; that after her daughter's death, Marybeth had balloons at her daughter's funeral, read such books as *Why Bad Things Happen to Good People* and withdrew emotionally from her fellow employees; all signs allegedly consistent with Munchausen Syndrome By

Proxy. The State experts disavowed the official pathology report that said Tegan met all of the criteria of Reyes Syndrome. The State experts asserted Tegan had no brain edema. Because of the absence of the brain edema, the State experts represented that the treating physician was incorrect in his diagnosis, that Tegan suffered from Reyes Syndrome. The Prosecution represented that the amount of caffeine found in Tegan was lethal. On Seth, the State said it was "inconceivable" that Seth suffered from Human Growth Hormone Deficiency, a genetic disease similar to Leigh's Syndrome.

The defense contended that both children suffered from a common genetic defect in the liver that caused Human Growth Hormone Deficiency in Seth and Reyes Syndrome in Tegan. The defense asserted that the amount of caffeine found in Tegan was a harmlessly small amount. The defense discovered on cross examination, that Dr. Hooper, the State's State witness, could not make the findings in the official toxicology report "fit" with a homicide. Dr. Hooper, a pathologist, on an unprovable "guess," had concluded that there was a laboratory error in the toxicology findings on the tissue. The State's toxicology expert, Dr. Scharman admitted that using the official toxicology report, that the amount of caffeine in the tissues was not lethal.

The defense interpreted the official reports as prepared. The State witnesses disavowed the findings in the official pathology and toxicology reports. The verdict indicates that the defense witnesses were not believed. The defense did not have the evidence to prove that the State tests and findings from 1982 were accurate.

In 1999, The West Virginia Supreme Court denied Marybeth's appeal which was based on the insufficiency of the evidence of Dr. Hooper's guess that the toxicology report was wrong. *State v. Davis*, 205 W. Va. 569, 519 S.E.2d 852 (1999).

Following the denial of her appeal, the defendant located the original spectrographs, tissue slides and

hundreds of pages of documents in the possession of the State Medical Examiner's Office or Dr. Hooper, the State's star witness. New genetic tests came available after 1999 that could safely be conducted on Seth Davis. Numerous Rule 33 Motions for a new trial on the basis of newly discovered evidence were filed and eventually consolidated into one motion. The lower Court Judge, denied the motion for a new trial. The West Virginia Supreme Court affirmed the denial of a new trial on an "abuse of discretion standard of review." A motion for reconsideration was timely filed and denied on February 16, 2005.

The Petitioner seeks a Writ of Certiorari to the West Virginia Supreme Court's decision that the newly discovered evidence below does not warrant the Petitioner a new trial. The newly discovered evidence and it significance is set out below.

(1) The Tissue Slides: The defense argued that Tegan died of Reyes Syndrome, the diagnosis of the treating pediatrician. In 1982, tissue slides of Tegan's autopsy were reviewed by two independent pathologists who reported, in the official pathology report, that the tissue slides met all of the criteria of Reyes Syndrome. Prior to trial, the defense filed specific motions seeking the tissue slides, Appendix H, and made an extensive personal search for them. The State responded that the slides had been lost with the passage of time. Appendix I. Dr. Hooper, who had performed the original autopsy and the preparation of the slides, denied they still existed.

At the trial, the State experts disavowed the official pathology report's findings, which indicated that Tegan had the brain edema associated with Reyes Syndrome and also the hospital laboratory tests that found that Tegan had high ammonia levels associated with Reyes Syndrome.

After the trial, Dr. Hooper revealed that she still had the original tissue slides in her possession. The tissue slides have been examined by two pathologists, Drs. Friedlander and Bove. Both pathologists concur in their

opinion that the slides prove that Tegan died of natural causes, Reyes Syndrome, or a genetic mimic thereof.

The tissue slides provide a wealth of information to dispute the contentions of the State. The slides show that Tegan had the brain edema of Reyes Syndrome. The ammonia associated with Reyes Syndrome produces little white bubbles that have the appearance of cotton balls in the photo enlargement of the brain tissue. A photo enlargement of the brain edema was shown to the West Virginia Supreme Court. A color photograph of the tissue slide of Tegan's brain is attached in Appendix G. This photograph illustrates exactly what killed Tegan Davis: ammonia bubbles in the brain. These ammonia bubbles are not associated with caffeine poisoning.

The remaining tissue slides show systemic viral infection and liver damage, the components of Reyes Syndrome. None of these pathology findings are associated with caffeine poisoning. The slides also rule out the tissue damage generally caused by a poisoning.

Standing alone, the tissue slides prove that Tegan died of Reyes Syndrome and not poisoning. Had the defense had this *Brady* evidence at trial, the defense would have had the evidence to rebut the testimony of the State, that there was no brain edema and could have shown the jury graphic proof of the effects this genetic disease causes.

(2) The Toxicology Spectrographs: Prior to trial, the prosecution represented that the State was going to defend the results of the 1982 toxicology findings which had been conducted at the West Virginia Medical Examiner's Office. In reliance on this promise, the defense withdrew a motion to redo the toxicology tests. During the trial, the State represented that their experts were interpreting the official toxicology findings. The defense was not aware that the prosecution regarded it the right of an expert, under the guise of interpretation of a report, to assume that a portion of the report was in error, and then to correct the perceived error. The State secretly built their

case on the assumption that the toxicology findings in the tissue were in error by 1000%. The State experts could not make the toxicology findings fit with a homicide, so, in their calculations, they increased the caffeine ten times above what was actually found in the tissue. A more detailed explanation of why and how the State altered the toxicology finding is set out in Appendix E and F. The Affidavit of Dr. Evans, a neutral toxicologist chosen by both the State and defense, is attached in Appendix D. Of particular importance is found on pages App. 30, 33, 34, 35, 36. His affidavit analyses the data found and explains why a caffeine poisoning did not occur.

Why the State had to Alter the official toxicology Report:

For the first few minutes after every drug is injected into the body, the drug will be concentrated in the blood before it flows through the blood and dilutes into larger volume of the tissues. The toxicology findings on Tegan indicated that the caffeine was concentrated ten times higher in her blood than in her tissue. This distribution of caffeine found in Tegan would exist after an injection of caffeine if caffeine was injected either a few minutes before or after her death.

When the quantity of caffeine found in Tegan's blood is measured by itself, the total caffeine is less caffeine than is found in a cup of coffee. Evans' Affidavit, page App. 35, par. 7, Appendix D. The fluid of the blood is only a fraction of the liquids found in all of the tissues. The total caffeine found in all of Tegan's tissues is harmless. The combined total caffeine found for both the blood and tissue is the harmless amount found in less than two cups of coffee. See Dr. Evans' Affidavit pages App. 35 and 36, par. 8, Appendix D. Because the caffeine is concentrated higher in the blood, the caffeine can only be diluting from the blood to the tissue. The direction of flow is controlled by the universal laws of science.

During Tegan's autopsy, Dr. Hooper found white beads in Tegan's digestive tract. The State expert, Dr. Hooper, thought these beads were the "plastic" remains of pills containing caffeine. The State's theory of a homicide required that the caffeine had to be given orally over a several day period and had to be lethal hours or even days before Tegan's death. Dr. Hooper could not make the small quantity and distribution of the caffeine actually found in the toxicology report to fit with a homicide. The distribution of the caffeine being higher in the blood than in the tissue meant that, what little caffeine was found, never reached the tissue. To get around this scientific obstacle, Dr. Hooper, in her calculations, increased the caffeine in the tissue ten times to equal the concentration in the blood. This alteration of the findings of the official report raised the caffeine to only about one-third of a lethal level, but with the blood and tissue being equal, an earlier, lethal amount of caffeine could be speculated. In her mind, Dr. Hooper increased the caffeine level from the harmless caffeine found in two cups of coffee to the lethal caffeine found in fifty to one hundred cups of coffee.

By Dr. Hooper's own admission, her imagined error in the toxicology was based on "a guess," for which she had "no proof." She also admitted that a vomiting three-year-old child's stomach could not hold the volume of pills needed to be consumed to make a poisoning possible. The State did not disclose this interesting aspect of their case prior to trial; and even today, the State refuses to explain how the toxicology findings are in error or how a caffeine poisoning is scientifically possible. The Hooper theory is the basis of the State's case, but the State will not explain her theory. See Appendix F for an analysis of Dr. Hooper's theory.

How the State altered the Toxicology Findings:

When a physician reads a toxicology report and sees the drug level found in the blood, he assumes that the measurement is representative of the drug's distribution

throughout the entire body. If he was only told of the amount of caffeine found in Tegan's blood, he would assume it had equally distributed to the tissue, which, in this case, it had not.

The Prosecution represented that their experts were interpreting the official toxicology findings. However, the State experts only used the caffeine found in the blood in their calculations, and ignored the lower caffeine levels in her tissue. The State experts compared the caffeine found in the blood to other cases of caffeine related deaths. In these comparison cases, however, the caffeine had had time to equalize into the tissue, and therefore, represented a greater amount of caffeine than was found in Tegan. The State experts gave formulas and quantities of caffeine to the jury that are accurate only if the official toxicology report is modified 1000% in the tissue. The result was a confusing array of conflicting testimony between to groups of experts, each claiming to be interpreting the toxicology report. This confusion is directly related to the State's belief that an expert can correct for imagined errors in the data provided to him. The West Virginia Supreme Courts publishing of data which shows the amount of caffeine found to be less than in a cup of coffee is the result of the confusion generated by the State. The West Virginia Court publishes the amount of caffeine the defense says is accurate, but the State cannot make fit.

The trial did not consist of two groups of experts with legitimate differences of opinion, rather, it was two groups of experts interpreting two different sets of data. The defense experts interpreted the whole toxicology report as being accurate, with the caffeine being ten times higher in the blood than the tissue. The State experts, on the other hand, in their interpretation, were using calculations that assumed the toxicology findings in the blood and tissue were equal. This modification of the toxicology report was heavily camouflaged behind the representations the State experts were interpreting the official toxicology report and that the State was defending the accuracy of the toxicology

findings. The defendant naively believed that guessing the toxicology findings were in error was covered in a pre-trial order barring Dr. Hooper from speculating on the chemical contents of Tegan's stomach.

At trial, when the defense stumbled onto the deception, the reasons offered by Dr. Hooper for her assumption that the toxicology findings were in error in the tissue were that: (1) the tissue tests were not run twice, (2) there was a suspected misplacement of the decimal point, (3) there was an unprovable laboratory error, and (4) a guess.

The Spectrographs prove the toxicology findings are accurate and the State Experts Wrong:

After the trial, the original spectrographs were located in the toxicology records of the State Medical Examiner's Office. Unlike the final toxicology report, the original spectrographs can be reviewed for accuracy. Contrary to Dr. Hooper's testimony, notations on the documents prove that the tests were run twice, with the same result.

Three Toxicologist have reviewed the Spectrographs:

The spectrographs have been reviewed by three toxicologists. *First,* Dr. Backer, who performed the tests in 1982, reviewed them and with one minor adjustment[1] confirmed their accuracy. He specifically contradicts Dr. Hooper and confirms that the decimal point is properly placed and that the results are accurate. *Second*, Dr. Evans of A.I.T. Laboratories was chosen by both the State and the defense as a neutral expert on toxicology. He also

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[1] Dr. Backer did a post-trial experiment. From his experiment he concluded that the caffeine levels might be increased as much as 60%, because of a recovery factor. The 60% increase raises the total caffeine found from one-and-one-half cups of coffee to slightly more than two cups of coffee. In order to make a caffeine poisoning scientifically possible the flow of the caffeine has to be reversed which requires an error in the toxicology of 1000%.

confirms the accuracy of the tests and the calculations. He places the total amount of caffeine at less than two cups of coffee and concludes that the caffeine came from an injection given at the time of Tegan's death. He concludes that a caffeine poisoning is not possible. Dr. Evans' Affidavit is attached as Appendix D. *Third,* Dr. Hupka, a toxicologist and pharmacologist also confirms the spectrograph's accuracy and explains why the amounts in the tissue could not be higher at an earlier time, and why the quantities and formulas used by the State do not apply to the toxicology findings in Tegan's case. These three toxicologists confirm the data and conclusion of the defense toxicologist, Dr. Shipe.

The West Virginia Supreme Court Justices also reviewed the spectrographs for themselves, and in direct contradiction of Dr. Hooper, they also confirm the toxicology findings in the tissue to be the exact amounts contended by the defense. Had the West Virginia Court taken the amounts of caffeine they publish, and compared these findings to the recognized levels of caffeine lethality from other cases, as set out in Dr. Evans' Affidavit, page App. 30, par. C, 1, found in Appendix D, the State Justices would be confronted with the fact that the total amount of caffeine found in Tegan's tissue is less caffeine than is contained in a cup of coffee: (Evans' Affidavit, page 9, App. 35, par. 7) or about 5% of a lethal amount. The total caffeine found in Tegan's entire body is less than two and cups of coffee. See Dr. Evans' Affidavit, pages App. 35-36, par. 12, Appendix D.

Dr. Hooper, the state expert, admitted that she could not make the toxicology findings fit with a homicide. Had the State not withheld the spectrographs in violation of *Brady v. Maryland*, the Defense would have had the demonstrative evidence to prove that the State's toxicology findings were accurate and a poisoning scientifically impossible.

(3) Dr. Hooper's Notes: After the trial, it was learned that the State had provided the defense only a select portion of the notes Dr. Hooper had retained from

the 1982 investigation. This discovery lead to the recovery of hundreds of notes, medical documents and memoranda, originally generated by Dr. Hooper acting in her capacity as a County Coroner.

A. At trial, the State argued that Tegan died from caffeine in diet pills, Dexatrim, found in the Davis home. Dr. Hooper speculated that little white beads found in Tegan's digestive tract were the plastic remains of the diet pills. The defense gastroenterologist testified that these beads are a common finding in sick children. The toxicology to determine the origin of the white beads was critical. The State experts conceded that their chemical content could not be determined from sight alone. The State experts conceded that PPA, the other ingredient besides caffeine found in diet pills, should have been found on the toxicology findings, but was not. The absence of PPA ruled out diet pills as the source of the caffeine. The Prosecution resurrected the issue and countered that PPA "might not have been tested for."

Dr. Hooper's withheld notes prove that in 1982 diet pills had been tested for and eliminated as the source of caffeine, thus stripping the State of the very murder weapon which was argued to the jury. The notes also prove that she conducted a futile but extensive search for any caffeine product which did not contain PPA, but could find no such product. In particular, she could not find a "timed released" caffeine product, mentioned as the murder weapon in the State Court opinion. If the defense had these notes found in her possession, and withheld in violation of *Brady v. Maryland*, the defense would have been able to prove the State's alleged murder weapon was eliminated in laboratory testing and that "timed released" caffeine product could not be found.

B. Dr. Hooper's withheld notes contained a memorandum of a phone call from a nurse, Carol Beckett, who was on the ambulance when Tegan died. She told Dr. Hooper that she thought too much Valium had been administered to Tegan by the treating physician. On a

post-trial deposition, Dr. Hooper stated that the police had threatened the nurse into silence.

On cross examination at trial, the nurse's belief about the valium did come out. She thought the treating physician had murdered the child with valium. In the heat of the trial, this accusation appeared to be the unsubstantiated allegation of one witness. The connection between valium and caffeine was not realized. Although rarely used today, caffeine was used as an antidote to valium in 1982. The total amount of caffeine found in Tegan is the exact amount that would have been injected into Tegan to counteract a suspected valium overdose. The distribution of the caffeine fits for an injection given at the time of Tegan's death. If the defense had been provided with this *Brady* evidence, the defense would have had a person with the means, motive and opportunity to have injected caffeine in an amount compatible, almost to the milligram, with what was found by the toxicologist in 1982.

(4) New Genetic Testing: The State alleged that Seth Davis was injected with insulin. The defense contended that Seth Davis suffered from Human Growth Hormone Deficiency. This defense was based on a test taken at Pittsburgh Children's Hospital shortly after Seth's arrival. This test was conducted under ideal conditions, in that Seth was under stress and was putting out the maximum growth hormone his body could produce. The test indicated that he was only producing one half of what his body needed. This test could not be replicated before the trial, because a stress test would have endangered Seth's life.

The experts from Pittsburgh Children's Hospital dismissed the test results and said that it was "inconceivable" that Seth had Human Growth Hormone Deficiency. After the trial, new and safer tests became available: Protein Binding Tests 1 and 3. These tests now prove to a scientific certainty that Seth suffered from untreated Human Growth Hormone Deficiency as represented by the defense.

These tests not only prove that Seth was the victim of professional negligence by Marybeth's accusers, they also provide additional proof that Tegan died of the same genetic defect. The defense presented a geneticist, Dr. Barry Wolfe, who testified that there are at least twenty genetic defects in the energy producing portion of the liver genes that would produce the Human Growth Hormone Deficiency in Seth and also produce the Reye's Syndrome in Tegan. Both afflictions arise in the liver and are caused by inborn errors of metabolism.

The State showed a video of Seth in his vegetative state and argued that his injuries were the result of one injection of insulin. The Prosecutors argued against the testimony of the geneticist, who contended that these two genetic afflictions were related. Untreated Human Growth Hormone Deficiency explains all of the alleged injuries suffered by Seth. These new genetic tests bolster the credibility of the defense witnesses who testified that the insulin found in Seth was the result of large doses of glucose administered to Seth prior to his arrival at the hospital, and that the test for artificial insulin was flawed due to its handling. The emotion producing film of Seth, can now be viewed as that of a child with a genetic defect, instead of a victim of a crime.

All of the newly discovered evidence is exculpatory or impeaching. With the exception of the new genetic tests, all of the new evidence was found in the control of investigators for the State. The newly discovered evidence is consistent with the other evidence, and proves to a scientific certainty that the two children suffered only from natural causes. The State of West Virginia, has not and cannot offer any explanation of how this new evidence is consistent with guilt. This new evidence provides a complete picture of the events. The children suffered from a common genetic defect and the amount of caffeine found in Tegan was administered by healthcare attendants to counter act valium.

The State Court's Opinion: The West Virginia Supreme Court circumvents this overwhelming evidence of innocence by: (1) Using an abuse of discretion standard of review instead of applying *Brady v. Maryland*. The State Court uses this standard, even though all of the evidence, with the exception of the new genetic tests, was either in the possession or control of the State. The State Court says all of this evidence is "merely cumulative" to the testimony the defense offered at trial.

(2) The West Virginia Justices read the spectrographs for themselves and concluded that the toxicology report accurately reported the totals on the spectrographs. In the process, they became witnesses who could not be confronted with the meaning of this evidence. The State Justices ignored the testimony, depositions and affidavits of four board certified toxicologists. As a result of this process, they have affirmed a conviction of a caffeine poisoning when the caffeine is less than found in a Coca Cola or two cups of coffee. The Justices affirm the accuracy of the toxicology data, and, in the same opinion, acknowledge the State experts could not make this same data fit with a homicide.

(3) The State Justices invent evidence to balance against this new scientific evidence. The West Virginia Justices claim that "caffeine pellets" were found in Tegan's gastric tract. Outside the Court's opinion, no one has ever testified that the white beads Dr. Hooper found were caffeine. Dr. Hooper said they were "inert, plastic." Even the prosecutor admitted, "She never said they were caffeine."

(4) The Court takes the position that expert opinion is separate from its underlying factual basis. The West Virginia Court takes the position that the defendant must

prove that the State experts held a different opinion from the one they testified to at trial, or else the appeal fails: "Opinion is opinion." Even though the underlying data used to support the State expert's opinion has been proven to be false, their opinions still exist on the record. In the West Virginia judicial mind the only way to get a new trial is to prove perjury on the part of the State experts. The fact that the underlying data the experts relied upon would not pass a *Daubert* reliability test, makes no difference to the West Virginia Court. One can only speculate what the State witnesses would do when confronted with the new evidence. Rule 33 Motions are by the affidavit or deposition of those willing to cooperate with the defense.

(5) The Court sets an unreasonable diligence standard for the defense attorney. The defense attorney filed written motions for the tissue slides, Appendix H, and to redo the toxicology tests. The State responded that the tissue slides no longer existed and that the State would bring Dr. Backer to trial to defend his test results. According to the West Virginia Court, the attorney is not diligent because he did not file a general discovery motion, when a specific motion failed. The defense attorney is to subpoena evidence from State witnesses, who have denied they have the evidence. The defendant is to be faulted for relying on the representations of the State.

Even though conclusive proof of innocence has come forward in the form of tissue slides, spectrographs and notes from the original investigation found in the possession of the State, the West Virginia Supreme Court simply will not afford to Marybeth Davis the protections of the Constitution that are set out in *Brady v. Maryland*.

REASONS FOR GRANTING THE PETITION

POINT ONE: The State of West Virginia refuses to follow *Brady v. Maryland*. Although the withheld evidence in the form of spectrographs, tissue slides and notes, was: (1) found in the possession of the State and her investigators, (2) was clearly exculpatory, and (3) was more than sufficient to raise a reasonable doubt, if not provide conclusive proof of innocence, the West Virginia Supreme Court refuses to afford the petitioner her Constitutional Rights of Due Process as set out in *Brady* and its progeny. The West Virginia Court uses an "abuse of discretion standard of review" with the result that any evidence, whether real or imagined is sufficient to deny her a new trial. This Court has a duty to enforce *Brady*.

The West Virginia Supreme Court blatantly denies the petitioner the protections afforded by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Although the post trial discovered notes, spectrographs and tissue slides were in the control of the State, the West Virginia Court refuses to follow *Brady v. Maryland* and relies upon an "Abuse of Discretion Standard of Review" so that the Court can use any evidence, imagined or otherwise, to deny the petitioner her *Brady* Constitutional Due Process Rights. A number of Courts do use the abuse of discretion standard for newly discovered evidence, mostly for recanted testimony or new evidence found beyond the control of the State. This case offers the opportunity to resolve any conflict in the laws, if any exists, between *Brady* and this parallel line of cases. Petitioner contends that with the withheld *Brady* evidence, the petitioner can prove her innocence to a scientific certainty.

This case presents a clear *Brady* viclation. In the case of *Banks v. Dretke*, 124 S. Ct. 1256 (2004), the United States Supreme Court said: "Elements of *Brady* prosecutorial

misconduct claim are: (1) the evidence at issue must be favorable to accused, either because it is exculpatory or because it is impeaching; (2) evidence must have been suppressed by state, either willfully or inadvertently; and (3) prejudice must have ensued." The petitioner meets these standards.

The new evidence found in this case was from one of three sources: (1) spectrographs were located in the State Medical Examiner's Office; (2) tissue slides and hundreds of pages of notes from the earlier investigation were located in the possession of Dr. Anne Hooper, the State's Star Witness, who performed the autopsy to meet the requirement of the County Coroner; and (3) genetic tests that came into existence after the trial. The new evidence is favorable to the accused and their absence was clearly prejudicial to the defendant. This new evidence is *Brady* material.

First: There is no Cumulative Evidence Exception to *Brady*. *Brady* states that the new evidence found must be either "exculpatory or impeaching." The West Virginia Court says that the new evidence is "merely cumulative." There is no "cumulative evidence" exception to *Brady*.

Second: There is no "potentially available" exception to *Brady*. The West Virginia Opinion states at page 5: "During the consideration of the appellant's motion for a new trial, both the State and Dr. Hooper indicated that *they potentially* made available to the appellant the evidence in their possession." (Emphasis added.)

The West Virginia Courts want to remove the State Medical Examiner's Office and its various departments, including the County Coroner's office from the obligations that *Brady* imposes. The spectrographs were located in the State Medical Examiner's Office. The tissue slides and notes were located in the possession of Dr. Anne Hooper who was acting out the requirements of law as a County Coroner, to do a required autopsy. Both were investigative agents of the State.

In the case of *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999), the Court said: "The due process duty of the prosecution under *Brady* to disclose evidence favorable to defendant is applicable even though there has been no request by defendant, and encompasses impeachment evidence as well as exculpatory evidence." In the case before the Court, the prosecution went so far as to assert that it had provided all *Brady* material. The defendant had requested the tissue slides from the State in writing and from Dr. Hooper informally. The West Virginia Court finds fault with the defense counsel for not subpoenaing evidence from State witnesses who denied they possessed the evidence.

Third: There is no Conclusive Proof of Innocence Standard under *Brady*. The West Virginia Court says that "The spectrographic results – they would not have conclusively contradicted the overall evidence that Tegan died of caffeine poisoning." *Brady* and its progeny do not require that the defendant prove her innocence "conclusively." *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995) states: "*Brady* does not require demonstration by preponderance that disclosure of suppressed evidence would have resulted ultimately in defendant's acquittal; rather, touchstone of materiality is 'reasonable probability' of different result." In *Banks v. Dretke*, 124 S. Ct. 1256 (2004), "Materiality standard for *Brady* claims is met when favorable evidence could reasonably be taken to put whole case in such different light as to undermine confidence in verdict."

But for the *Brady* violations, the defense would have had the physical proof to have confronted the state experts at trial who claimed the toxicology report was not accurate and who also said there was no brain edema of Reyes Syndrome. The West Virginia Supreme Court is simply not going to follow *Brady v. Maryland* and this Court should take the necessary steps to protect the Constitutional rights of those in their courts.

POINT TWO: The State of West Virginia has begun a very dangerous practice. Under the guise of interpreting scientific reports, the State experts are permitted to assume that portions of the official reports are wrong and then are permitted to secretly correct the imagined error. Petitioner contends this is pure "junk science." In this case, the State experts imagined that there was an error in the toxicology report and modified the findings from the equivalent caffeine amount of a harmless two cups of coffee to a lethal fifty or one hundred cups of coffee. The petitioner contends that it is a violation of her Due Process Rights to affirm a conviction that rests on the unproven assumption that the State scientific evidence is in error. Further, the petitioner contends that it is fundamentally unfair for the witnesses to secretly correct the perceived error by guessing the amounts are ten times higher than actually found. petitioner contends this should be considered to be prosecutorial misconduct.

A. The West Virginia Supreme Court is approving of, if not adopting, an extremely dangerous practice that permits State experts and Justices of the Court, when laboratory findings are in disagreement with their conclusions, to remedy the findings by altering the evidence to suit the conclusion they seek. The West Virginia Court quotes Dr. Hooper (Opinion P. 4): "and I decided in this case that the tissue levels didn't fit." In order to make this data "fit," as explained above, Dr. Hooper increased the level of the caffeine in the tissue to equal the caffeine concentration in the blood, an increase of 1000%. See Appendix F. The petitioner contends that if it is proven that the laboratory data is not reliable, that the only thing that can be concluded is that the data is not correct. What the data would be but for the laboratory error is pure speculation and "junk science." The presumption of innocence should bar any

attempt to make imaginary data fit so that a crime becomes possible. Correcting for imaginary errors should be considered prosecutorial misconduct.

B. The West Virginia Court requires the petitioner to prove perjury on the part of the State witnesses in order to obtain a new trial. The West Virginia Court says that "opinion is opinion," even if it relies upon or communicates false information.

> "In this Court's view, professional opinions given by competent experts, even if contradicted by opinions of other competent experts, cannot be said to be inherently false. *Opinion is opinion*, and the Court believes that only if it is shown than an expert's testimonial opinion is diametrically opposite to the opinion which he actually and truthfully holds at the time can the expert's opinion be said to be false. That has not been shown in this case." (Emphasis added.)

The Petitioner contends this case is distinguished from cases where two experts interpret the same data and arrive at different conclusions. In this case, the Petitioner has shown that the underlying factual assumptions of the State experts are false. The Petitioner should not have to prove perjury on the part of State witnesses to obtain a new trial, but should only have to raise a reasonable doubt about the reliability of the data upon which the State experts relied. As a minimum threshold, the defendant should only have to prove that the data would not meet a reliability standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

C. The West Virginia Court not only permits, but creates false evidence of its own. The West Virginia Court claims that "caffeine pellets" were found in the child's intestines. The toxicology report, bolstered by the withheld spectrographs, prove that caffeine of only 1% of a cup of coffee was found in Tegan at the time of her death. Dr. Hooper, who discovered the beads, speculated that the beads were "inert, plastic." The prosecuting

attorney admitted, "She never said they were caffeine." The petitioner contends that it is fundamentally unfair to use imaginary "caffeine pellets" to balance against tangible evidence and the trial record.

POINT THREE: This Court can determine what diligence is required of an attorney in his efforts to obtain evidence in the control of the State. The West Virginia Court ruled that an attorney is not diligent for failing to request general discovery, after specific discovery has failed; the defense attorney is to issue subpoenas for evidence that the State has indicated no longer exists. The Petitioner contends that the West Virginia Court violates the Petitioner's Due Process Rights by creating an unreasonable standard of diligence for an attorney to meet, a standard that is clearly not required under *Brady*. The Petitioner contends that the Court applies an unreasonable standard for evidence that is cumulative to what was presented at trial.

A. The West Virginia Court creates a Due Process violation by requiring, in a fourteen year old case, an unreasonable level of diligence that no attorney could be expected to meet. (A) The defense attorney was told in writing and on the record that the State had provided all *Brady* material. (B) In response to a written motion to redo the toxicology tests, the counsel was assured, in writing and on the record, that the State was going to bring in Dr. Backer, the toxicologist who conducted the tests, to defend his toxicology findings. The defense was led to believe he would not have to prove the reliability of the State's own tests. (C) In response to a Motion, the prosecution assured the Court and the defendant that Dr. Hooper would not speculate on the chemical content of the child's stomach. (D) In response to a specific motion for all tissue and tissue slides, the defendant was assured that

all tissue had been destroyed with the passage of time. (E) The defense personally contacted every institution and individual that seemed to have any possibility of having any evidence. To meet the West Virginia standard of diligence, the defense should have disbelieved the prosecuting attorney and issued subpoenas to individuals and organizations that denied that the evidence was in their possession. The defense counsel was to have filed a general request for discovery, when a specific request failed. This is simply beyond reasonable expectations of diligence. This court can help define what diligence is required of an attorney in a fourteen-year-old case to obtain evidence in the control of the State. Petitioner contends that *Brady* and its progeny have answered the question.

B. The West Virginia Court defines cumulative evidence as "additional evidence of the same kind to the same point." (1) Petitioner contends that in a case in which the State experts disavow the original pathology report, and claim there is no brain edema of Reye's Syndrome; that photo enlargements of tissue slides showing the brain edema of Reyes Syndrome is new evidence, and not merely cumulative to an official report the State experts disavowed. (See Appendix G. The white cotton balls are the brain edema.) (2) Petitioner contends that spectrographs that prove toxicology tests were run twice and which can be reviewed for accuracy are new evidence to impeach those who claim the tests are in error by 1000%. (3) Petitioner contends that new genetic tests developed after the trial that rebut the testimony of State witnesses who said it was "inconceivable" that the child was the victim of a genetic defect is more than merely cumulative. Each of these withheld pieces of evidence is new and different and have their own unique evidentiary value. One can only wonder as to what amount of evidence would be required to exceed the cumulative evidence level set by the West Virginia Court.

POINT FOUR: The Court has the opportunity to determine the effect of scientific advances that come into existence after the trial. Is the new scientific evidence, to be treated as *Brady* evidence, or should the Court follow some other standard.

The West Virginia Court wants to place all evidence not in existence at the time of the trial out of the protections of *Brady*. In this case, the Genetic Tests: Protein Binding tests 1 and 3 were not known in the medical community in 1997. They were accepted as accurate by the medical community in 1999 and are now treated as the definitive tests for Human Growth Hormone Deficiency. The State claimed that it was "inconceivable" that Seth had Human Growth Hormone Deficiency. These new tests prove that the State experts were wrong and defense experts were correct in their diagnosis. The petitioner contends that *Brady* covers unavailable evidence to the defendant whether it is in the possession of the State or not. Scientific advances that prove innocence should be welcomed.

POINT FIVE: When do judges become witnesses?

The procedural process by which the West Virginia Justices arrived at their decision after reading the spectrographs for themselves is now challenged as a violation of the defendant's Due Process and Confrontation rights under the United States Constitution. The Justices became witnesses who cannot be confronted. The Commentary found under Canon 3 of the Code of Judicial Conduct adopted by the West Virginia Courts supports the petitioner's position: "A judge must not independently investigate facts in a case and must consider only the evidence presented."

Reading the spectrographs for themselves would be a Due Process violation according to the Honorable George

D. Marlow, Judge of the Intermediate Appellate Court of the State of New York, in his article "From Black Robes to White Lab Coats; The Ethical Implications Of A Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process." St. John's L. Rev., Spring 1998, P. 291.

In this case, the West Virginia Supreme Court Justices interpreted the spectrographs for themselves and ignored the depositions and affidavits of three toxicologists who reviewed the spectrographs and concluded that these caffeine levels are only a fraction of the amounts required to harm anyone. Most importantly, they ignored State witnesses who admitted that, if the toxicology report is correct, no poisoning is possible. The West Virginia Court publishes the levels of caffeine that would be found in a person after drinking two cups of coffee, and still they affirm a caffeine poisoning. *Daubert* provides that the Court can take judicial notice of such laws of science as thermodynamics. Here the State Court ignores the testimony of experts on the known levels of caffeine lethality and the process by which caffeine distributes. Is it a problem of too much or too little science? The petitioner contents that it is neither. It is a problem of notice and an opportunity to respond.

When the State experts testify that brain edema does not exist, and the Court chooses to ignore a photo of the brain edema, the Court is acting as a blind pathologist. The petitioner makes the modest proposal that when Justices are going to make scientific assumptions contrary to the record that the litigant be notified of the assumption and afforded an opportunity to confront the new experts in black robes who appear to be unfettered by the record.

POINT SIX: Amendment VI of the U.S. Constitution requires that "the accused shall enjoy the right – to be informed of the nature and cause of the accusation." If this court is inclined to revisit *Daubert* in a criminal case, this case offers a conviction based on pure "junk science." This case is different from most cases in that it is the defendant who contends that the state scientific evidence is accurate and proves her innocent to a scientific certainty. The West Virginia Supreme Court has even published, as accurate, the tissue levels the state expert admits, does not fit for a poisoning. The petitioner contends that to be informed of the "nature and cause" of the accusation means more than just words on an indictment. Petitioner contends she has the right to demand that her accusers understand what "the nature and cause" of the alleged criminal act are, so that when she presents evidence of absolute proof of innocence, the courts will recognize it. The petitioner contends that the equal protection of the laws includes the laws of science.

In a caffeine poisoning case, any Court that publishes the caffeine levels found in the victim as less than 5% of a lethal amount and less caffeine than found in two cups of coffee, does not understand "the nature and cause" of the accusation. The petitioner contends that as an extension of her Due Process Rights, she has a right to have the Courts who judge her to understand the "nature and cause of the accusation" so that when the defendant proves to a scientific certainty her innocence with withheld *Brady* material, the Courts will recognize the importance of the scientific data presented.

Petitioner contends that the "Equal Protection of the Laws" also includes the laws of science. Marybeth Davis should not have a conviction of murder by caffeine affirmed wherein the caffeine is less than found in two cups of coffee and which could never have been higher. The

West Virginia Court contends this harmless amount of caffeine is a murder weapon. If this were true, this amount of caffeine would be a controlled substance, not one of the most common ingredients found in soft drinks, consumed by children every day.

Petitioner recognizes that *Daubert* concerns a civil evidentiary rule. However, West Virginia has adopted the Federal Rules of Evidence. This case offers the Court the chance to examine "Junk Science" in the criminal setting. This case offers a balance of fairness, in that it is the criminal defendant who is claiming that the State's evidence proves her innocence to a scientific certainty. This case is the opposite of *Daubert* in that the State is claiming that it can base a conviction on the assumption that the State's data is not reliable. This Court can set the limits of how scientific data can be corrected or ignored. This case shows what happens when the warnings of *Daubert* are ignored by the Court.

POINT SEVEN: Munchausen Syndrome By Proxy:

This case gives this Court the opportunity to look at what shocked the Courts of Great Britain: Munchausen Syndrome By Proxy.

See: Royal Courts of Justice, Strand, London, WC2A2LL, January 19, 2004, Angela Cannings, Appellant, v. Regina. In the Matter of B (A child) And the Matter of the Children Act 1989 between Kent County Council and (1) the mother and (2) the father.

Munchausen Syndrome By Proxy is named after Count Munchausen, who made up heroic stories to gain attention to himself. Dr. Roy Meadows named the disorder "by Proxy" for mothers who allegedly manufactured a tragedy to befall their children to gain attention for themselves.

More appropriately called Munchausen Syndrome By the Prosecution, State experts on Munchausen Syndrome

By Proxy go about the Courts of the United States testifying in behalf of the State, so that children can be taken from their parents and have their parents placed in jail; usually grief stricken parents of children with genetic defects or Sudden Infant Death Syndrome (SIDS). This diagnosis is not approved by the American Psychiatric Association as it is not based on a diagnosis, but is conclusion driven. The trials often become a witch hunt, instead of a search for the truth. Any type of behavior becomes a basis for proving the parent has this mental illness.

Since, the trial of this case, the Courts of Great Britain have banned the use of Munchausen Syndrome By Proxy in their Court rooms and have ordered a review of the cases involving this controversial diagnosis. It turns out, Dr. Roy Meadows, who coined the name and the concept, did so to hide his own malpractice. Parliament has been warned that it may have to pay out hundreds of millions of dollars in damages because of the use of this phoney diagnosis in their court rooms. This case presents a similar scenario, in that the new genetic tests prove Marybeth's accusers were guilty of malpractice. This case is an example of the prejudice this phoney diagnosis causes: The State Court made up Munchausen by prosecution fables of "caffeine pellets" to draw attention away from the fact that the State has never explained how a crime was consistent with the toxicology findings. This is simply profile evidence that aids the prosecution to vilify the defendant and offers nothing to determine whether a crime occurred.

CONCLUSION

The scientific issue is simple: No one in the recorded history of mankind has ever died of so little caffeine as published by the West Virginia Supreme Court. Appendix D. Dr. Evans' Affidavit, pages, 5, 8, 9, 10 explains why a poisoning is impossible. The West Virginia Court quotes Dr. Hooper (Opinion p. 4): "And I decided in this case that the tissue levels didn't fit." However, the West Virginia

Court publishes, as accurate, the very data the State experts testified "didn't fit" with a homicide. The West Virginia Supreme Court has published, as accurate, the levels of caffeine found in Tegan Davis, to be less than found in a Coca Cola or two cups of coffee. The lower Court acknowledges, as accurate, that the caffeine was ten times less in the tissue, as contended by the defense. This pattern of caffeine distribution proves that it is a scientific impossibility for a poisoning to have occurred in this case, even by the admission of the State witnesses.

But for the violations of *Brady v. Maryland*, the defendant would have had the demonstrative evidence to have confronted the State experts who claimed that Tegan did not die of Reyes Syndrome: or who claimed the decimal point on the toxicology tests was misplaced, or who claimed that the laboratory tests were not run twice. New genetic tests prove that the State experts were absolutely wrong when they said it was "inconceivable" that Seth had Human Growth Hormone Deficiency. All of the new evidence and notes provide compelling, if not conclusive proof of innocence. These children suffered a tragedy of nature, not man.

Although, this is a clear Due Process violation to withhold this *Brady* protected material, the underlying problem lies in the Constitutional provision, that the accused shall be informed of the "nature and cause of the accusation." The State of West Virginia has never explained how a caffeine poisoning is scientifically possible in this case. The petitioner contends these two words, "nature and cause" are not wasted surplusage, but require the accusers to understand the basic physical and scientific process of the alleged act, so that when positive proof of the impossibility of the alleged act is presented as a defense, it will be recognized.

The authors of *Daubert* are offered the opportunity to include the universal laws of science under the protection of the equal protection of the laws. The amount of caffeine found in Tegan Davis is well below any amount of caffeine

that has ever harmed anyone in the recorded history of mankind. The amount is less than is consumed by millions of people each day. The West Virginia Supreme Court should not be permitted to apply the physical laws of science in an unequal and discriminatory fashion.

The West Virginia Justices, by reading the spectrographs for themselves, in a manner totally contrary to the interpretation of three board certified toxicologists, became witnesses against the petitioner, she cannot confront. The West Virginia Justices ignore the affidavits and depositions of true experts for the sole purpose of evading the scientific evidence before them.

This is a case where innocence has been proven to a scientific certainty. This Court has the opportunity to correct a grave injustice and restore Marybeth to her other two children.

Respectively submitted by,

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